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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

vs.

[DEFENDANT],

Defendant.

NO. CR [CR number]

RESPONSE TO MOTION TO
SENTENCE DEFENDANT TO LIFE
IMPRISONMENT

(Assigned to the Honorable
[JUDGE'S NAME HERE])

For the reasons set forth in the following memorandum, the State of Arizona
opposes the motion to sentence the defendant to life imprisonment.

Submitted this ____ day of December, 2008.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

BY _____
[YOUR NAME HERE]
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

The defendant was indicted on [PUT DATE THAT HE WAS CHARGED, WHAT HE WAS CHARGED WITH, THE DATE WE FILED THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY, AND THE AGGRAVATING FACTORS WE ARE RELYING ON TO SEEK THE DEATH PENALTY.] The case went to trial and on [DATE OF VERDICT], the jury returned a verdict of guilty on [PUT WHAT CHARGES THE DEFENDANT WAS FOUND GUILTY OF]. On [PUT DATE THE MOTION TO SENTENCE DEFENDANT TO LIFE IMPRISONMENT WAS FILED], the defendant filed a motion to sentence the defendant to life imprisonment immediately. The defendant's motion was based on the United Supreme Court's holding in *Ring v. Arizona*, ___ U.S. ___, 122 S.Ct. 2428 (June 24, 2002). The State disagrees that the holding in *Ring* mandates a life sentence or that it warrants immediate sentencing, and asks this Court to deny the defendant's motion for the following reasons.

II. ARGUMENT

A. *Ring v. Arizona* did not hold that the Arizona capital sentencing scheme is unconstitutional. *Ring* only held that a jury rather than a judge must find an aggravating circumstance necessary for imposition of the death penalty. Therefore, the defendant's arguments are based on a false premise.

The defendant's motion repeatedly states that the United States Supreme Court recently held Arizona's capital sentencing scheme to be unconstitutional. *Ring v. Arizona*, ___ U.S. ___, 122 S.Ct. 2428 (June 24, 2002). However, he misstates the holding in *Ring*. The Supreme Court's decision in *Ring* **did not** invalidate Arizona's death penalty scheme

as it relates to all cases and all aggravators. The actual holding in *Ring* was very narrow, as follows:

For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, **to find an aggravating circumstance necessary for imposition of the death penalty**. See 497 U.S., at 647-649, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury.

Ring v. Arizona, 122 S.Ct. 2428, 2443 [emphasis added]. Thus, contrary to the defendant's assertion, the *Ring* Court did not hold that Arizona's judge-sentencing scheme was wholly unconstitutional. The Court's holding was limited to finding that the Sixth Amendment required the jury to "find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 2443. The Court in *Ring* also noted that its decision **would not** apply to aggravators that were based on "past convictions." *Id.* at 2437, n. 4. See also *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (prior conviction may be found by the judge even if it increases the statutory maximum sentence.) The Court also noted that *Ring* did not challenge the fact that the judge could make the ultimate determination whether to impose the death penalty. *Id.* at 2437, n. 4; see also *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). Justice Scalia summed up the *Ring* holding in his concurrence:

What today's decision says is that the jury must find the existence of the **fact** that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so – by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, **by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase**.

Ring v. Arizona, 122 S.Ct. 2428, 2445 [second emphasis added, J. Scalia concurring.]

In *Ring*, the State argued that when the jury found Ring guilty of both first-degree murder and armed robbery, the jury necessarily found the aggravator of pecuniary gain. The Supreme Court did not reject the State's assertion, but noted that the Arizona Supreme Court must consider the contention first on remand. 122 S.Ct. 2428, 2443, n.7. In her dissent, Justice O'Connor noted that while the Court's opinion would cause a lot of litigation, in her opinion the results of many of the cases would not change. *Id.* at 2449 [J. O'Connor dissenting.] Thus, the defendant's arguments in his motion are founded on a false premise – namely, that *Ring* held the entire Arizona capital sentencing scheme to be unconstitutional – and his arguments cannot stand.

B. Any unconstitutional portion of A.R.S. § 13-703 can be severed and removed from the remainder of the statute. Since certain aggravating factors are necessarily encompassed in a jury's verdict on the murder charge and related offenses, those aggravating factors survive *Ring* and remain in effect. Further, *Ring* does not require that a jury rather than a judge find that the defendant has prior convictions.

The defendant's position is that *Ring* has completely struck down the Arizona capital sentencing scheme and made it impossible for the State of Arizona to impose the death penalty on any defendant. However, as explained above, *Ring* did not do so. Accordingly, the defendant's arguments to that effect are fundamentally flawed.

The defendant recognizes that the United States Supreme Court did not hold that the entirety of A.R.S. § 13-703 was void. He suggests that only the portion of the statute related to imposition of the death penalty was found to be unconstitutional and submits that any unconstitutional portion of A.R.S. § 13-703 can be severed from the remainder. He correctly states that under the doctrine of severability, when part of a statute has been struck as unconstitutional, the remainder of the statute is presumed to be constitutional.

Regan v. Time, Inc., 468 U.S. 641, 653 (1984); *Randolph v. Groscost*, 195 Ariz. 423, 427, ¶ 13, 989 P.2d 751, 755 (1999).

The defendant then asserts that **all** of the portions of § 13-703 dealing with the death penalty must be struck. When those provisions are struck, he says, all that remains is the provision of § 13-703(A) that now must be read to state: “A person guilty of first-degree murder as defined in § 13-1105 shall suffer imprisonment in the custody of the state department of corrections for life.” In other words, the defendant asserts that since *Ring* was decided, there is no such thing as a death penalty case in Arizona, and accordingly that all first-degree murder prosecutions in Arizona are now non-capital cases. He then notes that in *State v. Viramontes*, 200 Ariz. 452, 455, ¶ 12, 27 P.3d 809, 812 (2001), the Arizona Supreme Court held that the special sentencing provisions of A.R.S. § 13-703(G) do not apply in a non-capital case. From this, he concludes that this Court may not hold a hearing under A.R.S. § 13-703 because his case is no longer a capital case.

First, as explained above, the defendant reads *Ring* far too broadly. Second, the State agrees that any unconstitutional portion of the statute can be severed, but maintains that it is only the offending aggravators that must be discarded, not the entirety of the Arizona capital sentencing scheme. To repeat: the United States Supreme Court **did not** invalidate the entire Arizona death penalty process; instead, the Court held in *Ring* only that the Sixth Amendment requires the **jury** to find certain aggravators. Assuming, without conceding, that such aggravators cannot be determined after the jury has entered a guilty verdict in a case, then the State could not use those factors to prove that the defendant is death-eligible. However, the non-offending aggravators should remain in effect.

Given the limited nature of the holding in *Ring*, the results of many of Arizona's death penalty cases will remain the same. It takes only one aggravating circumstance to make a death sentence possible. A.R.S. § 13-703(F) provides that in determining whether to impose a sentence of death or life imprisonment, the court must consider both aggravating and mitigating circumstances "and shall impose a sentence of death if the court finds one or more of the aggravating circumstances" and finds "no mitigating circumstances sufficiently substantial to call for leniency." See *State v. Hoskins*, 199 Ariz. 127, 148, ¶ 92, 14 P.3d 997, 1018 (2000). Under *Ring*, if the State alleges an aggravator under A.R.S. § 13-703(G)(1) (prior conviction where life imprisonment was imposable), or (G)(2) (prior conviction of serious offense), then the jury would not have to find any other aggravators to allow the trial judge to impose a death sentence. *Ring v. Arizona*, 122 U.S. 2428, 2437, n. 4. In this case, the State has alleged that the death penalty is warranted under A.R.S. § 13-703(G)(2) because the defendant has previously been convicted of a serious offense. Therefore, this Court alone can find that aggravating circumstance under *Ring* and there is no need for the jury to make any finding concerning that factor.

As for the other aggravating circumstances listed in A.R.S. § 13-703(G), if there were no qualifying prior convictions, *Ring* would nevertheless be satisfied as long as the jury verdict or findings would necessarily encompass one or more of the other enumerated aggravating circumstances. Because it takes only one aggravator to make a defendant death eligible, once one aggravating circumstance is found, then a judge can still weigh the evidence of mitigation and aggravation and impose a death sentence. *Ring v. Arizona*, 122 U.S. 2428, 2437, n. 4.

Many aggravating circumstances are, or could be, encompassed in a jury verdict. For example, under A.R.S. § 13-703(G)(8), a jury verdict finding a defendant guilty of multiple homicides would not require additional findings by the jury and would satisfy *Ring* because the jury found the fact (multiple homicides) making the defendant eligible for the death penalty. Depending on how the crime was charged, other aggravators might also be encompassed in the jury verdict. The jury would find facts constituting a finding under A.R.S. § 13-703(G)(9) (killing of a child under 15 or an adult over the age of 70), with a guilty verdict, unless the victim's age was in dispute. If the State alleged dangerous crimes against children, then the jury finding on that point would clearly satisfy *Ring*. See also A.R.S. § 13-703(G)(5) (pecuniary gain – jury verdict of armed robbery); A.R.S. § 13-703(G)(7) (killing while on authorized or unauthorized release or while in custody – jury verdict for escape); A.R.S. § 13-703(G)(10) (murdered person was a police officer). There are numerous ways that *Ring* can be satisfied under Arizona's present statutory scheme because most of the aggravating factors in § 13-703(G) can be encompassed by the jury's verdict on the murder charge and any associated offenses.

The State recognizes that two of the aggravating circumstances listed in A.R.S. § 13-703(G) – circumstances (G)(3) (grave risk of death to another) and (G)(6) (especially heinous, cruel, or depraved) – are incapable of being proved without a specific jury finding beyond the jury's guilty verdict. But, regarding all of the other circumstances, the State maintains that depending on how the crime is charged, the jury verdict may be sufficient to prove an aggravating circumstance to allow this court to proceed to sentencing. In this case, the State has not noticed (G)(6), but the State has noticed (G)(3) as a potential aggravating factor. Therefore, if this Court is inclined to proceed to sentencing, the State

could not rely on circumstance (G)(3) as a factor to make the defendant death-eligible. However, because the State has also noticed the aggravating circumstance (G)(2) (prior conviction of a serious offense), this Court can make that finding under *Ring* and proceed to sentence the defendant. *Ring v. Arizona*, 122 S.Ct. 2428, 2437, n. 4.

C. The defendant was not entitled to have the aggravating factors alleged in the grand jury indictment. Even if he were so entitled, his challenge is untimely under Rule 12.9(b), Ariz. R. Crim. P. Therefore, the defendant waived any objection to the grand jury proceedings by failing to file a timely challenge.

The defendant asserts that *Ring* held that aggravating factors are “elements of the offense of capital murder” rather than “sentencing factors.” From this position, he contends that he was denied a due process right to have those “elements” alleged in the grand jury indictment. He cites *Jones v. United States*, 526 U.S. 227, 232 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as well as Article 2, § 30 of the Arizona Constitution and Rules 2.2(a) and 13.2, Ariz. R. Crim. P. He then argues that because the indictment did not include allegations of the aggravating factors, the indictment was insufficient as a matter of law and that therefore the trial court should dismiss the indictment under Rule 16.6(b), Ariz. R. Crim. P.

The State disagrees with the defendant’s argument that he is entitled to have these factors alleged in the indictment; but, in any event, the defendant’s motion is clearly untimely under Rule 12.9, Ariz. R. Crim. P. That rule provides that the grand jury proceedings may only be challenged by a motion for a new finding of probable cause filed “no later than 25 days after the transcript and minutes of the grand jury proceedings have been filed or 25 days after the arraignment is held, whichever is later.” “A defendant waives his objections to the grand jury proceeding by failing to comply with the timeliness

requirement.” *State v. Lamb*, 142 Ariz. 463, 468, 690 P.2d 764, 769 (1984); *State v. Mulligan*, 126 Ariz. 210, 213, 613 P.2d 1266, 1269 (1980). The time limit in Rule 12.9 is mandatory. While the trial court may grant a motion to extend the time if the motion is made within the 25-day limit, “the trial court has no authority to grant an extension that is not made on a timely basis.” *Maule v. Superior Court*, 142 Ariz. 512, 515, 690 P.2d 813, 816 (App. 1984). Therefore, because the defendant waived this issue, this Court need not consider the untimely motion.

The defendant tacitly admits that his motion to dismiss the indictment is untimely. He does not cite Rule 12.9, but notes that questions as to the sufficiency of an indictment are usually argued before trial in the context of a motion under Rules 13.5(c) and 16.1. However, he notes that Rule 16.1(c) allows untimely motions and objections when the basis for the motion was not known when the motion should have been filed, “by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it.” He asserts that he could not have made this argument before the Supreme Court’s *Ring* decision was issued. The defendant concludes that the jury verdict of guilt did not rectify the “defective indictment” and that this Court must dismiss the indictment.

However, challenges to lack of probable cause to indict are not viable after the jury has found a defendant guilty. “[T]he issue of probable cause is a closed question after the jury determines a defendant’s guilt beyond a reasonable doubt.” *State v. Charo*, 156 Ariz. 561, 566, 754 P.2d 288, 293 (1988). Further, in *United States v. Cotton*, ___ U.S. ___, ___, 122 S.Ct. 1781, 1786 (May 20, 2002) the United States Supreme Court held that failure to

include *Apprendi* factors in the indictment was not plain error and that the defendant's failure to object waived the issue. The same result applies in this case.

D. Neither double jeopardy nor any other provision of law prohibits this Court from imposing the death penalty.

The defendant next claims that this Court cannot proceed with any capital sentencing hearing because "Arizona does not presently have a constitutional capital sentencing scheme in effect." He contends that because Arizona now has no death penalty law, the jury's verdict necessarily found him guilty, not of capital murder, but of the lesser-included offense of non-capital first degree murder. He asserts that, therefore, he can only be sentenced to life imprisonment. He concludes that the State cannot "retry him for capital murder" under the Double Jeopardy clauses of the United States and Arizona Constitutions.

There are several problems with this argument. First, as stated above, this argument is based on a false premise – that the *Ring* decision completely invalidated Arizona's capital sentencing procedures – and is therefore futile. Second, there is no such crime as "non-capital first degree murder" in Arizona, and thus the jury could not have found the defendant guilty of that offense. To reiterate, *Ring* **did not** abolish the death penalty in Arizona. Under A.R.S. § 13-1105 (C), "First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703." The jury found the defendant guilty of first degree murder, period; the sentencing phase will determine whether he receives life imprisonment or the death penalty. Third, there is no issue of "retrial." The defendant's original murder trial is still ongoing; the guilt phase has been completed and the sentencing phase is underway. Therefore, this Court need not consider this claim further.

E. If it is necessary to have a jury determine any aggravating factors alleged in this case, this Court may empanel a new jury expressly for that purpose. However, under the circumstances of this case, this Court

can determine the aggravating factor of “previously convicted of a serious offense” without involving the jury.

The defendant’s next claim is that he must be sentenced to life imprisonment immediately because there is no other alternative. He correctly notes that his trial jury has been discharged and cannot be reassembled to make any further determinations in his case, citing and quoting from *State v. Crumley*, 128 Ariz. 302, 306, 625 P.2d 891, 895 (1981). The defendant then argues that all enhancement provisions must be found by the **same jury panel** that found him guilty of the substantive charge, citing *State ex rel. Neely v. Sherrill*, 168 Ariz. 469, 472, 815 P.2d 396, 399 (1991). He recognizes that *Sherrill* specifically said that a second jury could be used in certain circumstances, but argues that those circumstances do not apply unless it was the defendant’s actions that required a second jury to be impaneled. The defendant says that nothing *he* did led to requiring a second jury – rather, he moved before trial to have the jury determine his sentence, but the State opposed that motion and the trial court denied his motion – and that therefore no second jury can be impaneled in his case. He concludes that neither the original jury nor a new jury can determine any aggravating factor in his case and that therefore the trial court must sentence him to life imprisonment.

The first problem with this argument is, as stated above, the defendant reads *Ring* far too broadly. Some aggravating factors may necessarily be included in the jury’s guilty verdict, and nothing in *Ring* requires the jury to find the existence of prior convictions. The second problem with this argument is that the defendant misreads *Sherrill, supra*. *Sherrill* does not say that a second jury can be impaneled only when the defendant did something to require a second jury. What *Sherrill* says is that a second jury can be impaneled unless the **State** was at fault. *Sherrill* specifically states:

A common element distinguishes those cases in which a second jury is allowed from those in which it is prohibited – the State's responsibility for necessitating the second jury. **If the State is not at fault in creating the need for the new jury**, A.R.S. § 13-604(K) and rule 19.1(b)(2) do not prohibit the use of a second jury to try the prior conviction allegation.

State ex rel. Neely v. Sherrill, 168 Ariz. 469, 472-73, 815 P.2d 396, 399-400 (1991)[emphasis added]. Thus, if this Court were to require a new jury to be impaneled in this case to determine any aggravating factor, this Court could do so because no one is “at fault.” This Court and the parties all acted properly under the law as it existed at the time of trial. Now that the United States Supreme Court has changed the law by issuing the *Ring* decision, the Court and the parties must follow that case. If this Court believes it is necessary to impanel a new jury, this Court can do so under *Ring* and *Sherrill*.

F. This is still a capital case, so Rule 26.3(a) does not apply – rather, the time limits of Rule 26.3(c) apply.

The defendant's final argument is that this Court must immediately sentence him to life imprisonment because, under Rule 26.3(a), Ariz. R. Crim. P., “Sentence shall be pronounced no less than 15 nor more than 30 days after the determination of guilt.” He argues that if he were sentenced immediately, he could only receive life imprisonment, and concludes that he will be prejudiced if the Legislature enacts a new death penalty statute before he is sentenced. But this argument is based on a false premise, namely, that since *Ring* was decided, there are now no capital cases in Arizona. As explained above, this argument misreads *Ring*. This is still a capital case, so the appropriate rule is Rule 26.3(c)(1), which states, “The penalty hearing shall be held not less than 60 days nor more than 90 days after the determination of guilt unless good cause is shown.” The State also suggests that any delay in sentencing caused by interpretation of the *Ring* decision and

legal changes to accommodate that decision would certainly be delay for “good cause” under that rule.

3. CONCLUSION

The defendant’s arguments are based on an incorrect reading of the United States Supreme Court’s decision in *Ring*. Therefore, for all the reasons set forth in this Response, the State asks this Court to deny the defendant’s motion and to hold a sentencing hearing under A.R.S. § 13-703 to determine whether to impose the death penalty or life imprisonment.

Submitted December ____, 2008.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

BY _____
[YOUR NAME HERE]
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
____ day of December, 2008, to:

The Honorable [Judge]
Judge of the Superior Court

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